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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JONATHAN DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether, by enacting 18 U.S.C. § 922(j), and thereby criminalizing the mere possession of stolen ammunition which at any time had been in interstate commerce, Congress unconstitutionally extended its Commerce Clause authority, in derogation of the several states' power to regulate common criminal conduct, so that, in the present case, shoplifting fifteen bullets from an Academy Surplus store resulted in a sentence of twenty-seven months in federal prison.

II.

Whether, by enacting 18 U.S.C. § 922(k), and thereby criminalizing the mere possession of a firearm which has had the serial number removed, if at any time such firearm had been in interstate commerce, Congress unconstitutionally extended its Commerce Clause authority, in derogation of the several states' power to regulate common criminal conduct, so that, in the present case, the possession of a stolen firearm resulted in a sentence of twenty-seven months in federal prison.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. Reasons for Granting Certiorari	3
3. Facts	4
ARGUMENT AND AUTHORITIES	7
1. Summary of the Argument	7
2. Congress' Authority Under the Commerce Clause	9
3. Both 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k) Exceed Commerce Clause Authority and Are Unconstitutional	10
A. The Statutes Regulate "Activities"	10
B. The Regulated Behavior Is Non-economic	11
C. No Substantial Effect	14
D. The Purported Jurisdictional Elements	15

TABLE OF CONTENTS – Continued

Page

E. Sections 922(j) and 922(k) Criminalize, as a Matter of Federal Law, Paradigmatic Common-Law State Crime and Therefore Violate State Sovereignty 20

F. There's a Serious Loophole Here 22

CONCLUSION 23

PRAYER 25

APPENDIX

Opinion of the Fifth Circuit Court of Appeals.... App. 1

Order of the United States District Court denying Jonathan Davis' motion to dismiss.... App. 3

TABLE OF AUTHORITIES

Page

CASES

U.S. SUPREME COURT

Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990) 19

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 19

Crowell v. Benson, 285 U.S. 22 (1932) 19

Del Vecchio v. Illinois, 474 U.S. 883 (1985) 8

Escobedo v. Illinois, 378 U.S. 478 (1964) 19

Fischer v. U.S., 529 U.S. 667 (2000) 17

Gonzales v. Raich, 545 U.S. 1 (2005) ..... *passim*

Haring v. Prosise, 462 U.S. 306 (1983) 8

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 19

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) 19

Jones v. United States, 529 U.S. 848 (2000) ..... *passim*

McConnell v. Federal Election Com'n, 540 U.S. 93 (2003) 10

NAACP v. Button, 371 U.S. 415 (1963) 19

NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964) 22

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 8

TABLE OF AUTHORITIES – Continued

Page

North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) 22

Sabri v. U.S., 541 U.S. 600 (2004) 14

Scarbrough v. United States, 431 U.S. 563 (1977) 23, 24

Scheidler v. National Organization for Women, Inc., 547 U.S. 9 (2006) 20

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 12

Steadman v. S.E.C., 450 U.S. 91 (1981) 14

United States v. Darby, 312 U.S. 100 (1941) 9

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) ... *passim*

U.S. v. Philadelphia Nat. Bank, 374 U.S. 321 (1963) 23

Wickard v. Filburn, 317 U.S. 111 (1942) 9, 13

U.S. CIRCUIT COURT OF APPEALS

United States v. Altobella, 442 F.2d 310 (7th Cir. 1971) 21

United States v. Kuban, 94 F.3d 971 (5th Cir. 1996) 24

U.S. CONSTITUTION

U.S. Const. Art. I, § 8, cl. 3 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

U.S. STATUTES

18 U.S.C. § 922(j) ..... *passim*

18 U.S.C. § 922(k) ..... *passim*

18 U.S.C. § 922(q) 10, 11, 14, 15

28 U.S.C. § 1254(1) 1

TEXAS STATUTES

Texas Penal Code § 12.23 6

Texas Penal Code § 31.03(e)(1) 4

SECONDARY AUTHORITIES

Webster's Third New International Dictionary (1976) 14

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. It is reprinted at App. 1.

The opinion of the United States District Court for the Western District of Texas is unreported. It is reprinted at App. 3.

STATEMENT OF JURISDICTION

This is a direct appeal from a judgment of the United States Court of Appeals for the Fifth Circuit dated August 30, 2007. There is no order respecting a rehearing, and no extension of time to file present petition for writ of certiorari has been filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes and constitutional provision are involved in the present case: (1) 18 U.S.C. § 922(j); (2) 18 U.S.C. § 922(k); and (3) the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3.

18 U.S.C. § 922(j) provides, in pertinent part:

> It shall be unlawful for any person to . . . possess . . . stolen ammunition . . . which is

> moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the . . . ammunition was stolen.

18 U.S.C. § 922(k) provides, in pertinent part:

> It shall be unlawful for any person knowingly . . . to possess . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

U.S. Const. Art. I § 8, cl. 3, provides that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATEMENT OF THE CASE

1. Nature of the Case

This is a direct appeal from the U.S. Fifth Circuit's judgment affirming Jonathan Davis' conviction for violations of 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k). Sections 922(j) and 922(k) provided the basis for the jurisdiction in the first instance of the U.S. District Court for the Western District of Texas.

2. Reasons for Granting Certiorari

In the long and continuing effort to define the precise boundaries of federal authority pursuant to the United States Constitution, from time to time Congress has overstepped its bounds. The tendency of Congress to attempt to extend its power to the fullest extent allowed by the Constitution is entirely understandable, and perhaps even laudable. In the present case, however, pursuant to its grant of authority under the Commerce Clause, Congress has made a federal crime of the mere possession of stolen ammunition and firearms, with the partial result that Jonathan Davis' conviction for shoplifting fifteen bullets from a local Academy Surplus store brought him a federal prison term of twenty-seven months, simply because, at some time since their manufacture, the bullets had traveled in interstate commerce, whereas, had he been convicted in state court of the pending applicable state shoplifting charge, his sentence could not have exceeded a fine of $500.00.

This Court has recognized that Congress' Commerce Clause authority is not without bounds. The mere possession of bullets or a pistol has no significant effect on interstate commerce, even if the bullets and pistol have been shipped from manufacturing facilities in one jurisdiction to retail outlets in another.

Whatever the intent of Congress might have been in enacting such legislation – whether gun control or the protection of U.S. citizens or some combination

thereof, all admirable propositions – it was never, and is not now, the intent of the Constitution to permit Congress to regulate the act of possessing, for example, fifteen bullets shoplifted from a local retail store as a federal crime pursuant to the Commerce Clause. But that's exactly what Congress has done in the present case, with rather draconian results.

Accordingly, as in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), this Court should reasonably restrict the reach of Congress' Commerce Clause authority, and find both 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k) unconstitutional, on their faces and as applied to Mr. Davis. Because the U.S. Fifth Circuit Court of Appeals refused to appropriately police the reach of Congress' Commerce Clause authority, it has decided important questions of federal law that have not been, but should be, settled by this Court.

3. Facts

In early 2006, the state of Texas charged Jonathan Davis for shoplifting fifteen bullets from an Academy Surplus store in Austin, Texas,[1] and indicted him for, among other things, stealing a pistol

[1] Mr. Davis was charged with a Class C misdemeanor, since the shoplifted bullets were valued at less than $50.00. Texas Penal Code § 31.03(e)(1).

from a private residence. [R. Vol. 2, 26-30; Defendant's Exhibits 1-8].[2]

While incarcerated on the Texas state charges, Mr. Davis was indicted in federal district court for violating 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k). [R. Vol. 1, 1]. Underpinning the § 922(k) charge of possessing a firearm the serial number of which had been removed were pictures showing Mr. Davis brandishing the stolen pistol, which, as it turned out, had been manufactured in Austria. [R. Vol. 2, 60-62; PSR 3-5]. Underpinning the § 922(j) charge of possessing stolen ammunition was the fact that the bullets shoplifted by Mr. Davis had been manufactured in Illinois. [R. Vol. 2, 62-63; PSR 3-5]. Thus, the federal charges brought against Mr. Davis were grounded in the same conduct, and concerned the same ammunition and firearm, for which he had been arrested, charged, and incarcerated in the original, concurrent Texas state proceeding.

Mr. Davis filed a motion to dismiss the federal indictment, arguing that both § 922(j) and § 922(k) were unconstitutional, facially and as applied to him, because by enacting such legislation Congress exceeded

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[2] Unless otherwise noted, subsequent references to the record on appeal, currently in the possession of the federal district court in Austin, Texas, will be as follows: R. Vol. ___. References to the transcripts will be: TR. Vol. ___. References to the presentence report will be: PSR ___. References to materials included in the required appendix to the present petition will be: App. ___.

its authority under the Commerce Clause. [R. Vol. 1, 19]. The District Court overruled Mr. Davis' motion to dismiss, and shortly afterward he pled guilty to the § 922 charges, noting at the time his intent to preserve for appeal the issue of the constitutionality of the statutes involved. [R. Vol. 1, 71; TR. Vol. 1, 3-5, 25].

The District Court ultimately sentenced Mr. Davis to, among other things, concurrent terms of imprisonment of 27 months on each count, followed by a 3 year term of supervised release, and a fine of $3,000.00.[3] [R. Vol. 2, 179-185]. Mr. Davis appealed to the Fifth Circuit Court of Appeals [R. Vol. 2, 186], which, on August 30, 2007, affirmed the judgment of the district court. [App. 3].

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[3] Had Mr. Davis been convicted in Texas state court for the Class C misdemeanor of shoplifting, his punishment could not have exceeded a fine of $500.00. Texas Penal Code § 12.23.

ARGUMENT AND AUTHORITIES

1. Summary of the Argument[4]

A thing's being "in commerce" is not equivalent to "having an effect on" commerce. The argument that the mere transport of a tangible thing across state lines by definition has a "substantial effect" on interstate commerce inexorably produces on the screen of those so engaged an immediate "end game" prompt to constitutional Commerce Clause analysis, for, in the end, such argument, if accepted, means that there is no limit whatsoever to Congress' Commerce Clause authority.[5] By such unwarranted logic, the limited and specific Art. I grant of Commerce Clause power to Congress swallows the rule of reserved state authority

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[4] For brevity's sake, Mr. Davis will not present separate arguments relating to § 922(j) and § 922(k). The arguments that each statute is unconstitutional are so similar as to not require separate discussion in the present petition. Equally, Mr. Davis' "as applied" and "facial" challenges to the statutes herein do not necessitate separate arguments. Mr. Davis will develop his various and well-founded constitutional arguments should this Court grant his petition.

[5] *See and cf. Lopez*, 514 U.S. at 600 (Thomas, J., concurring) (noting that, when asked at oral argument if there were ***any*** limits to the Commerce Clause, the Government was at a loss for words, the principal dissent insisted that there were limits on such congressional authority, but could not muster an example, and that, under the dissent's analysis, everything could "... be regulated under the guise of the Commerce Clause") (emphasis in original).

and obliterates the distinction between state and federal power.[6]

Since the mere possession of stolen ammunition or firearms does not have a substantial effect on interstate commerce, and are indeed in and of themselves not economic activities, but rather crimes, Congress exceeded its authority under the commerce clause when it enacted 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k). Because § 922(j) and § 922(k) were, and still are, unconstitutional, the District Court lacked jurisdiction to convict Mr. Davis thereunder.[7]

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[6] *See id.* at 584 (each state is sovereign as to powers reserved); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (the scope of the interstate commerce power may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government).

[7] The District Court's error was jurisdictional. Accordingly, Mr. Davis' plea of guilty did not waive his right to challenge the constitutionality of § 922(j) and § 922(k). *See Del Vecchio v. Illinois*, 474 U.S. 883, 884 (1985) (a voluntary plea of guilty waives all errors or irregularities that are ***not*** jurisdictional) (emphasis added); *Haring v. Prosise*, 462 U.S. 306, 320 (1983) (a plea of guilty does not bar review of all claims involving constitutional violations antecedent to the plea; thus, a defendant who pleads guilty may seek to set aside his or her conviction based on prior constitutional claims which challenge "the very power of the State to bring the defendant into court to answer the charge against him [or her]").

2. Congress' Authority Under the Commerce Clause

The Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce. *See, e.g., United States v. Darby*, 312 U.S. 100, 114 (1941). In *Lopez*, 514 U.S. at 558-559, this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce.[8]

Put another way, with respect to activities purportedly within the ambit of the Commerce Clause, proper constitutional analysis requires a determination of whether a regulated activity "substantially affects" interstate commerce. *Id.* at 559; *see also Gonzales v. Raich*, 545 U.S. 1, 17 (2005), *quoting Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942) ("even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce").

Most importantly, Commerce Clause case law demonstrates that in those cases where this Court has sustained " . . . federal regulation of intrastate activity based upon the activity's substantial effects

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[8] *Lopez* provides the proper framework for conducting a Commerce Clause analysis. *Morrison*, 529 U.S. at 609.

on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611, *citing*, *Lopez*, 514 U.S. at 559-560; *see also Morrison*, 529 U.S. at 611, n. 14 (in every case where this Court has sustained federal regulation under even the aggregation principle, the regulated activity was of an "apparent commercial character"). Thus, a rational basis must exist for concluding that a regulated activity sufficiently affects interstate commerce. *Lopez*, 514 U.S. at 557.

That said, Congress' power to regulate commerce, though broad, is not without limits. *Id.*; *see also McConnell v. Federal Election Com'n*, 540 U.S. 93, 187 (2003) (" . . . in maintaining the federal system envisioned by the Founders, this Court has done more than just prevent Congress from commandeering the States. . . . [w]e have also policed the absolute boundaries of congressional power under Article I").

3. Both 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k) Exceed Commerce Clause Authority and Are Unconstitutional

A. The Statutes Regulate "Activities"

For purposes of the Commerce Clause analysis, both 18 U.S.C. § 922(j) and 18 U.S.C. § 922(k), as did former 18 U.S.C. § 922(q) in *Lopez*, address the regulation of an activity that purportedly exerts a substantial effect on interstate commerce, *i.e.*, the third of the three broad categories of activity that

Congress may regulate under its commerce power. *See Lopez*, 514 U.S. at 559.

B. The Regulated Behavior Is Noneconomic

Also as with former § 922(q) in *Lopez*, current § 922(j) and § 922(k) have nothing at all to do with commerce or any sort of economic enterprise; nothing for which Mr. Davis was convicted in the present case had anything to do with commerce or any sort of economic enterprise. *See Raich*, 545 U.S. at 3 (" . . . the laws at issue in *Lopez* and *Morrison* had nothing to do with 'commerce' or any sort of economic enterprise"); *Lopez*, 514 U.S. at 561 ("[s]ection 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *see also Morrison*, 529 U.S. at 617-618 ("[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce . . . [t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").[9]

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[9] *Cf. Jones v. United States*, 529 U.S. 848, 855 (2000) (the phrase, "used in commerce," "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce").

By no credible stretch of the imagination can it be said that Mr. Davis' mere possession of the stolen fifteen bullets and firearm was undertaken for economic reasons. *See and cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting) ("... the discharge of fill material into the Nation's waters is almost always undertaken for ***economic*** reasons") (emphasis added); *Raich*, 545 U.S. at 3 (the constitutionally permissible California statute regulated "quintessentially economic activities," *i.e.*, the production, distribution, and consumption of commodities (drugs and, specifically, marijuana) for which there was an established, lucrative, and large interstate market; prohibiting the intrastate possession or manufacture of articles of commerce was therefore a rational means of regulating commerce in such products). Instead, in the present case, Mr. Davis' motivations were purely personal, lacking any commercial, economic, or business related interest.[10] *See and cf. Jones*, 529 U.S. at 856 (in construing a federal anti-arson statute that applied only to property that was used in an activity that affected commerce, this Court noted that the owner used the property as his home, not in any trade or business).

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[10] In fact, the photos of Mr. Davis brandishing the stolen pistol, which formed the factual proof for the federal charge that Mr. Davis possessed a stolen firearm, suggest that Mr. Davis was motivated by an inclination to show off to his friends.

This Court has repeatedly observed that the effect required under the Commerce Clause analysis is ***economic***. *See Raich*, 545 U.S. at 17, *quoting Wickard*, 317 U.S. at 128-129 (an activity can be reached by Congress " . . . if it exerts a substantial ***economic*** effect on interstate commerce") (emphasis added); *see also id.* at 25 (in *Morrison*, this Court held the Violence Against Women Act of 1994 unconstitutional, " . . . because, like the statute in *Lopez*, it did not regulate economic activity").

Mr. Davis' conduct was from beginning to inglorious end utterly noneconomic. *See Morrison*, 529 U.S. at 617-618 (" . . . a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case"); *see also Raich*, 545 U.S. at 35-36 (Scalia, J., concurring) (in *Lopez* and *Morrison*, this Court was conscious of the potential of the "substantially" affects test to obliterate the distinction between what is national and what is local and rejected the argument that Congress may regulate ***noneconomic*** activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences; thus, although Congress' authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to pile inference upon inference in order to establish that noneconomic activity has a substantial effect on interstate commerce) (emphasis in original).

C. No Substantial Effect

Still like former § 922(q) in *Lopez*, in the present case both § 922(j) and § 922(k) lack any nexus between the mere possession of stolen bullets and a pistol and a substantial effect on interstate commerce that is not decidedly attenuated.[11] *See U.S. v. Morrison*, 529 U.S. 598 at 612 (" . . . our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated"); *see also Sabri v. U.S.*, 541 U.S. 600, 601 (2004) (in *Lopez* and *Morrison*, this Court struck down federal statutes regulating gun possession near schools and gender-motivated violence, respectively, because it found the effects of those activities on interstate commerce insufficiently robust).

Raich makes the point. In *Raich* 545 U.S. at 6-7, users and growers of marijuana for medical purposes under a California statutory scheme sought, unsuccessfully, a declaration that the federal Controlled Substances Act was unconstitutional as applied to them. On appeal, this Court concluded that, "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that

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[11] "Substantial" means "considerable in amount." *Steadman v. S.E.C.*, 450 U.S. 91, 98, n. 16 (1981), *quoting Webster's Third New International Dictionary* (1976).

failure to regulate the intrastate manufacture and possession of marijuana would leave a ***gaping hole*** in the [Controlled Substances Act]." *Id.* (Emphasis added; citation and footnote omitted). In support of its conclusion, this Court specifically noted that exemptions to the California statute would have "a significant impact on both the supply and demand sides of the market for marijuana." *Id.* at 30; *see also id.* at 31 ("[t]he exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market").

No "gaping hole" concerns exist in the present case. Further, there are no concerns about stolen bullets or pistols having a significant effect on either the supply and demand side of any established or illicit commercial market for such articles.[12]

D. The Purported Jurisdictional Elements

The primary material difference between *Lopez* and the present case is that, in *Lopez*, former § 922(q) contained no express jurisdictional element which might have limited its reach to a discrete set of activities that had an explicit connection with, or effect on, interstate commerce. *Lopez*, 514 U.S. at 562. In contrast to *Lopez*, in the present case, Congress has

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[12] In *Raich*, 545 U.S. at 21, n. 31, a government estimate was cited "that in 2000 American users spent $10.5 ***billion*** on the purchase of marijuana." (Emphasis in original).

attempted to incorporate a purported "jurisdictional element" into both § 922(j) and § 922(k).

Section 922(j) addresses stolen ammunition " . . . which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen . . . ," and § 922(k) addresses stolen firearms which have " . . . at any time, been shipped or transported in interstate or foreign commerce."

It is important to note that the existence of a jurisdictional element in § 922(j) and § 922(k) does not mean that the statutes automatically pass constitutional muster. In other words, such jurisdictional elements are not dispositive in the present case. Although "important," the existence of such elements is but one of several factors to be considered in the Commerce Clause inquiry. *Morrison*, 529 U.S. at 611-612 (the jurisdictional element was the "second consideration" this Court found "important" in *Lopez*). At best, the jurisdictional elements of § 922(j) and § 922(k) could only ever but indicate that their enactment was in pursuance of Congress' regulation of interstate commerce. *Morrison*, 529 U.S. at 612 ("such a jurisdictional element ***may*** establish that the enactment is in pursuance of Congress' regulation of interstate commerce") (emphasis added).

Thus, even though § 922(j) and § 922(k) contain purported jurisdictional elements, this Court must still determine, through a case-by-case inquiry, that Mr. Davis' possession of the fifteen stolen bullets and

the stolen pistol "affects interstate commerce." *Lopez*, 514 U.S. at 561 (former § 922(q) contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"); *see also and cf. Fischer v. U.S.* 529 U.S. 667, 689 (2000) (Thomas, J., dissenting), *quoting Lopez*, 514 U.S. at 561 ("[w]ithout a jurisdictional provision that would ensure that in ***each*** case the exercise of federal power is related to the federal interest in a federal program, [the federal statute] would criminalize routine acts of fraud or bribery, which . . . would 'upse[t] the proper federal balance'") (emphasis in original).

For example, in *Jones*, 529 U.S. at 850, a federal statute made it a federal crime to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," and this Court considered the question whether arson of an owner-occupied private residence fell within the statute's compass. The government relied principally on the breadth of the statutory term "affecting . . . commerce," words, remarked this Court, that when unqualified signal Congress' intent to invoke its full authority under the Commerce Clause. *Id.* at 854.

In *Jones*, the language "used in interstate commerce" and "affecting . . . commerce" can be properly characterized as a "jurisdictional element," and a

very broad one at that.[13] Nonetheless, undertaking the case-by-case analysis required by *Lopez*, this Court stated that the proper inquiry was into the function of the building itself, and then a determination of whether that function affected commerce. *Id.* Accordingly, in *Jones*, the mere presence of a broad jurisdictional element did not preclude further detailed Commerce Clause analysis. Moreover, the purported jurisdictional elements did not save the statute from constitutional invalidation. *See id.* at 850-851.

The necessary case-by-case analysis required by *Lopez*, and exemplified by *Jones*, is particularly important with respect to any purported Commerce Clause jurisdictional element, because, by careful drafting, Congress can attempt to connect a particular activity to interstate commerce – perhaps even where such a connection does not exist. After all, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not

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[13]

> Were we to adopt the Government's expansive interpretation . . . hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

Jones, 529 U.S. at 857.

necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981) (Rehnquist, J., concurring); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964) (Black, J., concurring) ("whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court"). Drafting is form, not substance.[14] Furthermore, Congress should never be permitted to bootstrap itself into Commerce Clause jurisdiction in matters of purely criminal, non-economic activity. *See and cf. Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction).

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[14] To conclude that, without more, the existence of purported jurisdictional elements automatically rendered a statute irreproachable on Commerce Clause grounds would be to elevate form over substance, a not particularly favored approach in traditional constitutional analysis. *See, e.g., and cf. NAACP v. Button*, 371 U.S. 415, 429 (1963) (the government "cannot foreclose the exercise of [First Amendment] rights by mere labels"); *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell v. Benson*, 285 U.S. 22, 53 (1932) (regard must be had in cases where constitutional limits are invoked, "not to mere matters of form but to the substance of what is required"); *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235 (1897) ("[i]n determining what is due process of law regard must be had to substance, not to form").

As demonstrated herein, the conduct for which Mr. Davis was convicted does not have a sufficiently robust nexus, if any at all, to support permissible regulation thereover by Congress pursuant to the Commerce Clause.

E. Sections 922(j) and 922(k) Criminalize, as a Matter of Federal Law, Paradigmatic Common-Law State Crime and Therefore Violate State Sovereignty

This Court has recognized that policing crime is a state concern. *Lopez*, 514 U.S. at 561, n. 3 (states possess primary authority for defining and enforcing the criminal law); *see also Jones*, 529 U.S. at 857-858 (*Lopez* invalidated the Gun-Free School Zones Act, which made it a federal crime to possess a firearm within 1,000 feet of a school, stressing that the area was one of traditional state concern).

In the present case, Congress has attempted to regulate purely "paradigmatic common-law state crime."[15] *See id.* at 858 (to read the federal statute as encompassing the arson of an owner-occupied private home would effect a change in the federal-state balance in the prosecution of crimes, for arson is a paradigmatic common-law state crime); *see also Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 20 (2006) (to read the federal statute as

[15] Again, under Texas law, shoplifting is only a Class C misdemeanor.

broadly as urged by the government "... would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution").

Both § 922(j) and § 922(k) violate state sovereignty. *See and cf. Raich*, 545 U.S. at 41 (Scalia, J., concurring) ("... neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation 'inappropriate ...'"). As in *Jones*, this Court should be most reluctant to believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as the present. *See Jones*, 529 U.S. at 859 (Stevens, J., concurring), *quoting United States v. Altobella*, 442 F.2d 310, 316 (7th Cir. 1971) ("[i]t also seems appropriate, however, to emphasize the kinship between our well-established presumption against federal pre-emption of state law ... and our reluctance to 'believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this'") (citation omitted).

Indeed, the fact that in the present case Mr. Davis received a sentence of twenty-seven months in federal prison for the ammunition charge when the maximum punishment for the corresponding state offense under Texas law could not exceed a fine of $500.00, demonstrates how § 922(j) in particular has displaced a statutory policy choice made by the state of Texas. *See Jones*, 529 U.S. at 859 (Steven, J., concurring) ("[t]he fact that petitioner received a sentence of 35 years in prison when the maximum

penalty for the comparable state offense was only 10 years . . . illustrates how a criminal law like this may effectively displace a policy choice made by the State") (citation omitted).

F. There's a Serious Loophole Here

As mentioned, the § 922(j) charges against Mr. Davis were based upon the fact that the fifteen bullets from the Austin, Texas Academy Surplus he tried to shoplift were manufactured in Illinois. If, however, at the same time Mr. Davis experienced his *shopliftus interruptus* in Texas, a twenty-year-old resident of Illinois was apprehended shoplifting exactly the same kind of bullets, made by exactly the same Illinois manufacturer, but from an Academy Surplus store located in Illinois, it seems altogether likely that such young Illinois resident would ***not*** be charged with a violation of § 922(j), since the stolen bullets would never have been moving in, or a part of, interstate commerce, a very asymmetric and unjustifiable result.

"Loopholes" in legislation are not favored, and should be avoided. *See North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 524 (1982) (a U.S. senator stated that a legislative amendment " . . . closes loopholes in existing legislation relating to general education programs and employment resulting from those programs . . . "); *see also id.* at 544 ("[t]he amendment was intended to close loopholes in earlier civil rights legislation"); *NLRB v. Fruit and Vegetable*

Packers and Warehousemen, Local 760, 377 U.S. 58, 65 (1964) (when major labor relations legislation was being considered in 1958, the closing of certain loopholes was important to the House and to some members of the Senate); *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 342, n. 18 (1963) (a federal statute's amendment followed many years of unsuccessful attempts to enact legislation plugging the assets-acquisition loophole); *cf. Scarborough v. U.S.* 431 U.S. 563, 576 (1977) (theories advanced on appeal created "serious loopholes" in the congressional plan to make it unlawful for a firearm to be in the possession of a convicted felon).

CONCLUSION

The facts of the present case demonstrate that Congress exceeded its Commerce Clause authority by enacting § 922(j) and § 922(k). Both statutes are unconstitutional, both facially and as applied to Mr. Davis.

A couple of observations from respected federal judges provides a noteworthy conclusion to the present petition. The first, from Justice Thomas of this Court:

> . . . it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States.

Lopez, 514 U.S. at 585 (Thomas, J., concurring).

And the second, from Justice DeMoss, of the Fifth Circuit Court of Appeals:

> *Lopez* is a fundamental and landmark restatement and redefinition of the powers of Congress under the Commerce Clause. Whatever may have been the ambiguities and lack of clarity under prior case law as to whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause, the Court stated in *Lopez* that "consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activities substantially affects interstate commerce." In my view, this conclusion means that . . . the possession by a convicted felon of a firearm must now "substantially affect interstate commerce." Consequently, the "minimal nexus" of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement of substantially affecting interstate commerce. The mere fact that a felon possesses a firearm which was transported in interstate commerce years before the current possession cannot rationally be determined to have a "substantial impact on interstate commerce" as of the time of current possession.

U.S. v. Kuban, 94 F.3d 971, 977-978 (5th Cir. 1996).

So too in the present case.

PRAYER

For all the foregoing reasons, Jonathan Davis respectfully prays that this Court grant his Petition for Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50003
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JONATHAN DAVIS

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:06-CR-63-ALL

(Filed Aug. 30, 2007)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Jonathan Davis appeals his guilty-plea conviction and sentence for possession of

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

stolen ammunition and possession of a firearm with an obliterated or removed serial number, in violation of 18 U.S.C. § 922(j) and (k). The government has moved for summary affirmance. Alternatively, the Government seeks an extension of time to file a brief.

Davis asserts that the enactment of § 922(j) and (k) exceeded Congress's authority under the Commerce Clause because the subsections did not require a significant effect on interstate commerce. He has not shown that these subsections violate the Commerce Clause. *See United States v. Luna,* 165 F.3d 316, 319-22 (5th Cir. 1999). Davis also contends that § 922(j) and (k) are unconstitutional as applied to him because his federal offenses arose from the same factual patterns as state charges for theft and unlawful appropriation. In light of his admission that the firearm and ammunition in question passed through interstate commerce, § 922(j) and(k) were constitutional as applied to him. *See id.* at 322.

Accordingly, the government's motion for summary affirmance is GRANTED, its alternative request for an extension of time is DENIED as unnecessary, and the decision of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

-vs-

JONATHAN DAVIS

CAUSE NO.
A-06-CR-063-SS

ORDER

(Filed Oct. 4, 2006)

BE IT REMEMBERED on the 28th day of September 2006, the Court called the above-styled case for a hearing on Defendant Jonathan Davis's Motion to Dismiss [#28]. Having considered the motion, the Government's response [#39], the evidence presented at the hearing, the relevant law, and the case file as a whole, the Court denied the motion in open court, and now confirms the same in this written order.

Background

Defendant Jonathan Davis is charged in a two-count indictment with violating 18 U.S.C. § 922(j) (Possessing Stolen Ammunition) and 18 U.S.C. § 922(k) (Possessing a Firearm with the Serial Number Removed). Prior to being charged with these federal crimes, Defendant was charged in Travis County state court with three counts of theft of a firearm, two counts of burglary, and one count of theft

for matters arising from the same conduct as the federal charges. Def.'s Mot. Dismiss, Exs. A-F.

Defendant stipulated that the ammunition referred to in Count One of the Indictment consists of fifteen rounds of Winchester, 71gr., .32 caliber ammunition, which were manufactured in East Alton, Illinois and were shipped in and transported in interstate commerce prior to Defendant's possession of them in Texas. Gov't.'s Response 1; Factual Basis 4. Defendant also stipulated that the firearm referred to in Count Two of the Indictment consists of a Glock, Model 23, .40 caliber pistol, serial number BLX611US, which was made in Austria and imported by Glock Incorporated in Smyrna, Georgia. Govt.'s Response 1; Factual Basis 3. The Glock pistol was shipped in and transported in foreign and interstate commerce prior to Defendant's possession of it in Texas. Gov't.'s Response 1-2.[1]

Discussion

Defendant moves to dismiss the indictment in this case for the following reasons: (1) 18 U.S.C. §§ 922(j) and (k) are facially unconstitutional because Congress exceeded its power to regulate interstate

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[1] Defendant's argument here is that notwithstanding the fact that the ammunition and firearm at issue were shipped and transported in interstate commerce before Defendant possessed them, Congress exceeded its power to regulate interstate commerce when enacting 18 U.S.C. §§ 922(j) and (k).

commerce in passing these statutes; and (2) these statutes are unconstitutional as applied to Jonathan Davis. Def.'s Mot. Dismiss 2-3.

Defendant acknowledges that his arguments have been foreclosed by existing Fifth Circuit precedent and that he is "raising these issues solely to preserve them for possible review by the United States Supreme Court." Def.'s Mot. Dismiss 3.

With regard to the facial challenge, the Fifth Circuit has held that 18 U.S.C. § 922(j) is a constitutional exercise of Congress's commerce power. *United States v. Luna,* 165 F.3d 316, 319-21 (5th Cir. 1999). Likewise, the Fifth Circuit has upheld the constitutionality of § 922(g), the felon in possession of a firearm statute, on many occasions. *See United States v. Daugherty,* 264 F.3d 513, 518 (5th Cir. 2001) (rejecting Defendant's claim that his offense was purely local in nature rather than "in and affecting" interstate commerce because "'the constitutionality of § 922(g) is not open to question.'") (quoting *United States v. DeLeon,* 170 F.3d 494, 499 (5th Cir. 1999)); *United States v. Kuban,* 94 F.3d 971, 973 (5th Cir. 1996) (rejecting challenge to constitutionality of 18 U.S.C. § 922(g)(1)); *United States v. Rawls,* 85 F.3d 240, 242-43 (5th Cir. 1996) (rejecting facial challenge to constitutionality of § 922(g)(1)). The same rationale given in these cases applies to a facial challenge to the constitutionality of § 922(k). Accordingly, this Court denies Defendant's facial challenge to the constitutionality of 18 U.S.C. §§ 922(j) and (k).

Defendant also claims 18 U.S.C. §§ 922(j) and (k) are unconstitutional as applied to him. As stated above, Defendant has stipulated that both the ammunition and the pistol at issue in this case were shipped and transported in interstate commerce before he possessed them. Accordingly, Defendant's facial challenge is also denied. *See, Luna,* 165 F.3d at 322 (rejecting as applied challenge to constitutionality of § 922(j) where Defendant broke into house, stole firearms, was apprehended and stipulated that three of the five firearms named in the indictment were manufactured in either New York or Connecticut before reaching Texas); *Rawls,* 85 F.3d at 242-43.

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion to Dismiss [#28] is DENIED; and

IT IS FURTHER ORDERED that all remaining pending motions are DISMISSED AS MOOT.

SIGNED this the 2nd day of October 2006.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE